IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Criminal Appeal No. 438 of 2001 , decided on 16.9.2003

Narendra Nath Roy Vs. State
and another

A.F.R. (Approved for reporting)
~~Not approved for reporting~~

Date 16/9/2003 Initials of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

Court No.3

Criminal Appeal No.438/ 2001
(Old No. 2699/1982)

1- Harnedra Nath Roy
S/o Sri Panchanand Roy,
2- Sashi Bhushan
S/o Mathura Nath,
both residents of village Chandan Nagar,
P.S. Rudrapur, District Udham Singh Nagar …. Appellants.

Vs.

State of Uttaranchal ….. Respondent.

Date of delivery of judgment: 16th September, 2003.

Hon'ble P.C.Verma, J.
Hon'ble Irshad Hussain, J.

(Delivered by Hon'ble Irshad Hussain, J.)

This is an appeal against the judgment and order dated 21st October 1982.

(2). The appellants are residents of village Chandan Nagar of P.S. Rudrapur, District Udham Singh Nagar. Deceased Karnail Singh was resident of Settlement Motipur No.2 of the same Police Station. Informant eye witness Sohan Singh (P.W.2) resident of Settlement Motipur No.1 also of the same Police Station is the brother-in-law of the deceased. Eye witness Balvinder Singh (P.W.3) is son of the deceased and whereas the third eye witness Rishipal Singh(P.W.4) resident of village Neta Nagar of the same Police Station is an acquaintant of the deceased.

(3). The case of the prosecution was that in the night of 26th/27th July, 1981deceased Karnail Singh was sleeping in his court-yard. The above name three eye witnesses and other family members were also asleep nearby in the court-yard. On being disturbed by the barking of the dogs they woke-up. The deceased Karnail Singh flashed his torch towards the passage in the north. There the two appellants were seen standing. The appellant Shashi Bhusan was possessed of a gun and whereas the appellants Harendra Nath Roy was carrying a pistol. The deceased Karnail Singh asked them as to why they were there in the odd hours of the night. As the point of time appellant Harendra Nath Roy gave exhortation to kill the deceased Karnail Singh because he had forcibly taken their land. both the appellants then fired their weapons and shot hit the deceased Karnail Singh on the chest. He died

instantaneously on the cot. Both the appellants then fled towards the west. The witnesses have recognized them in the light of the electric torch.

(4). The next morning i.e. on 27-7-1981 Sohan Singh (P.W.1) prepared the written report, Ex.Ka.2 and lodged it at the Police Out Post Dineshpur at 5.30 a.m. The case crime No. 338 under section 302 I.P.C. was registered and investigation of the cased was taken up by S.I. R.S.Pandey (P.W.7). He left for the scene of the incident and held inquest on the dead body of deceased Karnail Singh lying on the cot as it had been shifted to the chhappar when it started raining soon-after the occurrence. Ex.Ka.4, is the inquest report and the connect papers are. Exx.Ka-9 to Ka.12. He attached blood-stained matteress (exhibit-1) and pillow (exhibit-2) vide memo, Ex.Ka.5 and inspected the torch of the deceased and gave it in the Supurdagi of Sohan Singh vide memo, Ex.Ka.3. Site plan, Ex.Ka.13 of the place of the occurrence was also prepared. He also recorded the statements of the witnesses. Arrest of the appellants was made on 12.11.1981. Later on the investigation was taken up by Inspector Sultan Singh and ultimately it was entrusted to Inspector Krishna Singh who submitted charge sheet, Ex.Ka.14, against these appellants on 13.11.1981.

(5). According to the prosecution appellants were entertaining enmity against the deceased on account of the deceased having dispossessed appellant Harnedra Nath Roy from 1 ½ acre of land belonging to one Dheerendra. The deceased was attorney of said Dheerendra whose said land was forcibly occupied by the said appellant.

(6). The appellants denied the accusations of the prosecution and claimed that they have been falsely implicated in the case due to enmity. The appellant Harendra Nath Roy also stated that he was not known to witness Rishipal Singh and whereas Sashi Bhushan urged that he was known to witness Balbinder Singh only.

(7). At the trial, on order to bring home guilt to the appellants prosecution relied upon the evidence of 7 witnesses. Post mortem on the dead body of deceased Karnail Singh was performed by P.W.1, Dr. S.P.Singh. Eye witness P.W.2, P.W.3 and P.W.4 namely Sohan Singh, Balbinder Singh and Rishipal Singh supported the prosecution case as narrated above. P.W.5, constable Sohan Singh gave formal evidence of taking dead body for post mortem. P.W.6, Jogendra Singh is Panch witness of the inquest as well as of

attachment of matteress and pillow referred above. P.W.7, S.I. R.S.Pandey has proved the investigation part of the case. Dr. Gurucharan Singh was examined as court witness because the defence suggested to the eye witnesses that soon after the incident this witness was summoned to the house of the deceased and till that time the identity of the assailants was not known. The witness however categorically denied making any visit to the house of the deceased that night.

(8). P.W.1, Dr. S.P.Singh of Civil Hospital Haldwani District Nainital performed post mortem at 4 p.m. on 27.7.1981. The following ante mortem external injury was detected:-

> "A gun shot wound, ½ cm x ½ cm x chest cavity deep on left side of chest, 6 cms above the left nipple at 11 O'clock position. No blackening and tattooing present. Margins inverted. Wound of entry."

On internal examination a hose was found in the upper lobe of left lung and a hold in left ventricle of heart in both the anterior and posterior walls. A bullet was removed from the left side 12th thoracic vertebra. In the opinion of the medical officer the death of the deceased had been caused due to haemorrhage and shock as a result of the ante mortem injury. He also testified that the injury was, in the ordinary course of nature, sufficient to cause the death. He proved post mortem report, Ex.Ka.1.

(9). The learned II Additional Sessions Judge, Nainital, on appreciation of the evidence of the prosecution convicted both the appellants under section 302/34 I.P.C. and sentenced each of them to life imprisonment per judgment dated 21st October 1982. Aggrieved, the appellants filed this appeal.

(10). Heard Sri B.P. Srivastava learned counsel for the appellants and learned G.A. for the State and considered the evidence on record, the circumstances and the probabilities of the case. It need to be mentioned that it is not in dispute that the death of deceased Karnail Singh was homicidal and that the occurrence took place at the time and placed as alleged by the prosecution.

(11). The learned counsel for the appellants submitted that the evidence of the eye witnesses does not inspire confidence in view of the fact that the presence of light at the time of incident is highly doubtful. P.W.2 gave definite evidence that the night of the incident was dark. However the source of light according all the thee eye witnesses was the torch light which

deceased Karnail Singh flashed on the appellants. Eye witnesses P.W.2, P.W.3 and P.W.4 were cross-examined to assail their testimony about the source of light but nothing could be brought on record as may discredit their claim. Electric torch of the deceased was even inspected by I.O., P.W.7 and the same was in working condition. It was thereafter given in the Supurdagi of P.W.2 vide memo, Ex.Ka.3. No doubt the informant eye witness, P.W.2 did not bring the electric torch to court when he was examined but on account of this it can not be accepted that the claim made by him and other witnesses about the source of light lack credibility.

(12). The learned counsel then argued that even in the torch light it was not probable that the identity of the assailants could have been fixed by the witnesses who were sleeping at a considerable distance from the place where the cot of the deceased Karnail Singh was kept in the court-yard while he was asleep. Site plan, Ex.Ka.13 reveal that there was distance of about 15 steps only between the cot of the deceased and the place where the three eye witnesses were sleeping on their cots and all of them woke-up on the noise of dogs barking. All the witnesses gave definite evidence that they knew both the appellants from before the occurrence and as stated above the appellants also have not alleged that they were not known to all the three eye witnesses. In a dark night flash of light become more illuminating and even a glimpse of the appellants would have facilitated their recognition and fixing of their identity from a distance of about 15 steps by the eye witnesses. When the incident took place, the deceased Karnail Singh had flashed electric torch right on the appellants and therefore their could not have been any confusion in identifying them by the three witnesses who were also attracted towards the appellants. It is also in the evidence of all these witnesses that appellant Harendra Nath Roy exhorted is companion appellant Shashi bhushan to kill the deceased Karnail Singh and this gave a further occasion to the witnesses to fully recognize at the time of the incident. The cross-examination of the eye witnesses does not admit of any inference of any inconsistency and inherent improbability in their testimony and therefore we see no reason to disbelieve their evidence that they identified the appellants at the time of the incident. The learned Sessions Judge made proper appreciation of the evidence in this regard also and we

find no infirmity in the conclusion drawn from the evidence by the learned Sessions Judge.

(13). Out of the three eye witnesses two, namely, informant Sohan Singh (P.W.2) and Rishipal Singh (P.W.4) were staying as guests in the house of the deceased in the night of the occurrence and the learned counsel for the appellants argued they being chance witnesses their evidence do not inspire confidence in their reliability. P.W.2 is the real brother-in-law of the deceased and he had on that day gone to Rudrapur to arrange finances for paddy corp. He got late to return in the night and opted to stay at the house of his relation, the deceased. Considering the relationship the decision to stay at the house of the deceased is quite natural and we see no merit in the argument that he is a got up witness and has had no occasion to be there in the night of the incident. Likewise Rishipal Singh, a resident of the adjoining village has had reason to stay at the house of the deceased that night on account of his acquaintance with the deceased. He stated that he has no friendship with the deceased. Even then the acquaintance was sufficient for him to stay there with the deceased because in our society apart from the friends and relatives an acquaintant is also welcomed to be the guest and is extended due to hospatility. The witness had come to the village of the deceased to arrange for the labourers for paddy plantation and could not return to his village on account of fall of night. There is nothing in his cross-examination which may belie his claim about the reason to visit the village of the deceased and to stay there in night and therefore this witness also can not be termed as a chance witness. In other words the evidence of both P.W.2 and P.W.4 can only be discarded if it is shown that their evidence in regard to the actual incident is basically infirm and inherently improbable. On this score we find that the defence had, even by their lengthy cross-examination, failed to make any dent on the shell of their credibility. In fact they have stood the test of the cross-examination and their evidence being cogent and definite on the point that the two appellants appeared in the passage north of the place where the deceased was on his cot and on exhortation both of them fired shots from their respective weapons and that the deceased Karnail Singh was hit on the chest and died instantaneously remain creditworthy.

(14). P.W.2, gave out that after the deceased was hit by the fire arm shot he had not chased the appellants. The conduct was adversely commented upon the dispute his presence on the ground that a close relative would at least make effort to apprehend the culprits on the happening of such an incident. The witness has given a plausible reason that he refrained from doing so due to fear. The reason given being natural does not admit of any suspicion. Every person react differently on the happening of such incident and it can not be taken to be a rule that a close relative should not hesitate to chase the assailant of his relative. Therefore the evidence of the witness on account of said conduct would not adversely tell upon his credibility.

(15). In regard to the evidence of P.W.4 some minor infirmities were high lighted in the argument. The infirmity relate to the direction where the wife and children of the deceased were sleeping in the court-yard in the night of the occurrence. Such infirmities do occur even in the evidence of truthful witnesses on account of lack of sense of direction, distance and also difference of power of absorption in memory of insignificant things compared to the actual incident which gets prominence in the memory of the witness. Therefore, no undue importance deserve to be attached to the minor infirmities and we find no reason to discredit the evidence of this witness on this basis. In other words his evidence too as also stated above remain intact; worth placing implicit reliance as regards the proof and corroboration of the prosecution story and involvement of the appellants in the commission of the crime.

(16). As regard the other eye witness of the case, namely, Balvinder Singh (P.W.3) is concerned there can be no gain saying that he being the son of the deceased is the most natural witness of the incident. It is well settled that a close relative like a son would not leave out the real culprits who have eliminated his father and would go to falsely name any innocent assigning any reason for his implication. Having considered on this touch stone the testimony of the witness we are of the firm view that his evidence is also inherently consistent as well as inherently probable and it leaves no manner of doubt that the incident took place as alleged by the prosecution. It was pointed out that it was strange that being the son of the deceased he had not at once left for reporting the matter to the police station and decided to fetch his brother Kaloo in the night at about 4.30 a.m. from adjoining Settlement

Motipur No.1 although the summoning of the brother did not merited preference as against reporting the matter to the police. We see no force in the argument because a son of the murdered person would have urge to summon his real brother who was away at the time of incident rather than to first of all report the matter to the police. The attitude and conduct was in the peculiar circumstances of the case highly natural and probable and there is thus no reason to detract from reliance being placed on his testimony. In other words the evidence of this witness is wholly reliable and it fully corroborate the prosecution version that the appellants with their respective weapons appeared there and after exhortation fired shots and also that the one shot hit the victim Karnail Singh who died on the spot, at the time and placed as alleged.

(17). The evidence of the eye witnesses was also sought to be disbelieved on the ground that the medical evidence is at variance to the claim made by them. All the eye witnesses have been consistent on the point that the appellants fired from a distance of 3 or 4 steps from the deceased Karnail Singh. As mentioned above blackening and tattooing was not present on the gun shot wound of the victim. The deceased Karnail Singh was sitting on his cot after he woke up and then he was fired at by the appellants. The learned counsel for the appellants submitted that if the shot was fired from such a short distance of about 3 or 4 steps blackening and tattooing was bound to occur around the wound and absence of these characteristics indicate that the witnesses have not seen the incident. All the witnesses are village people. None of them appear to be literate in the sense that he can tell the distance to an approximate extent accurately. By mere distance as given by the witnesses and absence of above characteristics their testimony can not safely be termed as untrustworthy. Even otherwise it is not the case of the prosecution that the fire arms wielded were standard or branded weapons. A distance of about four steps between the appellant and the deceased when the shot was fired was not even otherwise so small as may necessarily cause blackening or tattooing around the gun shot wound by a non standard fire arm. On this account also we can not be forced to accept the submission that the evidence of the witnesses on the basis of the distance become infirm and unreliable. Therefore we are of the firm view that the credibility of these three eye witnesses on being tested for its inherent consistency and inherent

probability remain intact. In short the witnesses are truthful whose testimony can not be disbelieved or in any way doubted. The learned Sessions Judge has drawn similar inference on a elaborated discussion of the evidence and in our view the learned counsel for the appellants has failed to point out any infirmity in the judgment of the learned Sessions Judge on this count.

(18). The F.I.R. of the case was lodged next morning at 5.30 a.m. and considering that the occurrence took place in the odd hours of the night at about 1.30 a.m. we see no merit in the argument that the F.I.R. is delayed. There is also nothing incriminating against the genuineness of the F.I.R. which do not admit of any suggestion of deliberation and consultation in its preparation and lodging with the police. The evidence of the witnesses is consistent with the version of the F.I.R. as stated above and therefore the F.I.R. also corroborates their evidence and prove the prosecution case as laid in it. There can be gain saying that the medical evidence as discussed above also corroborates the evidence of the eye witnesses and supports the prosecution story.

(19). The motive part of the case was also made subject matter of the criticism. It need to be stated that there being direct and cogent evidence to prove the prosecution case the question of motive loses its significance. However the evidence of P.W.3 who is the son of the deceased is also positive on the point that appellant Harendra Nath Roy got displeased when he was dispossessed from the land of Dheerendra by the deceased Karnail Singh in his capacity of Mukhtiyar of said Dheerendra. This witness was not subjected to cross-examination on this point and therefore his evidence was sufficient to establish the cause for the commission of the crime.

(20). Both the appellants have been fastened liability of committing the crime of murder with the aid of section 34 I.P.C. The learned counsel for the appellants submitted that in the fact of the facts and circumstances of the case section 34 I.P.C. could not have been applicable to saddle the appellants with the responsibility of committing the murder punishable under section 302 I.P.C. In support of the contention it was pointed out that the deceased has sustained only one gun shot injury and a bullet was extracted from the left side 12^{th} thoracic vertebra which prove that only one weapon was fired.Considering the medical evidence there can not be any dispute about the fact that the deceased sustained only one bullet injury ant the bullet was

of .315 bore. No weapon was recovered on any discloser statement of any of the appellant. The learned counsel referring to the evidence of eye witnesses argued that appellant Sashi Bhushan was attributed possession of a gun and considering the bullet injury it was inherently probable that 12 bore gun was not used in causing the fatal injury to the deceased and therefore the participation of this appellant in the commission of the crime become highly doubtful. It is settled that applicability of section 34 I.P.C. depends upon the facts and circumstances of each case and no hard and fast rule can be laid down as to the applicability or non-applicability of section 34 I.P.C. However for the applicability of this section it is necessary that the offence must have been committed in furtherance of common intention even though the acts of the culprits may be different in character. The evidence of the prosecution witnesses is definite and cogent on the point that both the appellants came together and on exhortation to kill Karnail Singh wielded their fire arms. Both the appellants have, according to the witnesses fired from their weapons and since their weapons were not standard or branded in their making, one can not be definite as to which of the two appellants had fired the fatal bullet. Moreover the weapons being non-standard, it can not be assumed that .315 bullet could not have been fired by a gun. These type of weapons may even have mis-fire noise only giving impression that the victim had been hit by the shot. Therefore possibility that the weapons not being standard one of them missed the target on being fired and pellets, tickli and wads may have been lost in the mud, as it rained soon after the occurrence, can not be ruled out. This aspect of the matter was also considered by the learned Sessions Judge with reference to the argument advanced on behalf of the appellants. At any rate the presence of both the appellants together with firm arms, firing of their respective weapons and thereby killing the deceased Karnail Singh is fully established by the evidence of the prosecution. Therefore in the totality of the circumstances of the case constructive liability of both the appellants under section 34 I.P.C. by virtue of the act done by them in furtherance of the common intention stand established beyond reasonable doubt. The appellants were, therefore, liable to be held guilty and convicted of offence of murder punishable under section 302 I.P.C. with the aid of section 34 I.P.C., even though charge against them was not framed there-under i.e. section 34 I.P.C.

(21). In view of the above analysis we are of the view that the appellants have rightly been held guilty and convicted under section 302 I.P.C. read with section 34 I.P.C. for committing the murder of deceased Karnail Singh. The appeal being devoid of merit and substance is dismissed. Both the appellants are on bail. Their bail bonds are cancelled and sureties discharged. They shall be taken in to custody and shall be sent to jail to serve out the sentence as awarded by the learned Sessions Judge per judgment dated 21st October 1982.

(22). Let the record of the case be sent to the court concerned for compliance. The report of compliance be submitted within one month.

(Irshad Hussain, J.) (P.C.Verma, J.)

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